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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

Conservatorship of the Estate
of ROBERT THOMAS
GORMAN.

B285618

(Los Angeles County
Super. Ct. No. BP170120)

SUSAN GORMAN GERKE,

Petitioner and
Appellant,

v.

JAMES ROBERT GORMAN,

Petitioner and
Respondent.

APPEAL from orders of the Superior Court of Los Angeles
County. Barbara Johnson, Judge, and Brenda Penny,
Commissioner. Affirmed.

Corey Evan Parker, Manhattan Beach, for Petitioner and Appellant.

Eric A. Woosley, Santa Barbara, for Petitioner and Respondent.

After their elderly father died, the son sued the daughter in probate for maladministration of the father's trust during the last years of the father's life. The trial court ultimately surcharged the daughter \$981,178. In this appeal, daughter argues that the trial court (1) wrongly imposed \$76,000 of that surcharge, and (2) abused its discretion in suspending her as trustee in the midst of the litigation. These arguments lack merit, so we affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

A. *The family, the trust and the trust amendment*

Robert and Virginia Gorman (collectively, parents) married and had two children—appellant Susan Gorman Gerke (daughter) and respondent James Robert Gorman (son). Between them, daughter and son had three children of their own (collectively, grandchildren).

In 1996, the parents executed a family trust. The trust named the parents as co-trustees while both were alive, named the surviving parent as sole trustee should one of them die, and named son and daughter as co-trustees once both parents died. Ultimately, the trust provided that 82 percent of the trust's assets would be evenly split between son and daughter, and the remaining 18 percent would be evenly split among the grandchildren. Among other things, the trust provided that “[t]he trustee may permit any beneficiary to reside upon or occupy any real property in the Trust Estate or use any personal

property in the Trust Estate, upon such terms, provisions or conditions as the Trustee determines.”

In June 2009, Robert¹ amended the trust. Instead of son and daughter being co-trustees following his death or incapacity, daughter was named as primary successor trustee and son as secondary successor trustee. By this time, Virginia had passed away and son had been convicted and imprisoned for felony child molestation.

B. *Daughter becomes trustee*

Due to Robert’s mental incapacity, daughter began serving as the trustee of the trust in June 2009, although she would sometimes consult with Robert. Robert was suffering from dementia, and at times it was so severe that he would think daughter was his girlfriend.

Between July 2009 and March 2011, daughter moved Robert into her home in northern California and cared for him. Between March 2011 and Robert’s death in September 2015, daughter placed Robert in three different skilled nursing facilities. Daughter used trust assets to pay \$220,551.20 for Robert’s nursing care, but the trust suffered a \$96,234.15 judgment after she left bills unpaid at the last facility.

In July 2012, daughter moved into her father’s house on Golden Meadow Drive in Rancho Palos Verdes (the family home). The house was an asset of the trust. Daughter lived there without paying rent until July 2017.²

¹ We use the parents’ first names for ease of reference. We mean no disrespect.

² Although the parties stipulated that daughter moved out in June 2017, the trial court found that she remained until July

As of June 1, 2009 (right before daughter took over as trustee), the trust's assets included the family home, liquid assets of \$574,759.55 in five different brokerage and bank accounts, monthly retirement-related income of \$4,786.76 and quarterly dividend income of \$681.12. By June 1, 2017, the trust's liquid assets had been depleted to \$4,455.50; the trust owed \$20,012.71 on a line of credit; the trust had not paid the property taxes on the family home since 2012; and, as noted above, the trust had suffered a \$96,234.15 judgment. Bank records reflect that daughter wrote herself checks drawn on the trust-held accounts totaling \$593,900; directly transferred \$7,500 to one of her accounts; and used money from the trust-held accounts to pay for purchases from dozens of retailers, including Amazon.com, J. Crew and Williams-Sonoma.

II. Procedural Background

In January 2016, son filed a verified petition pursuant to Probate Code section 17200³ alleging (1) breach of trust, (2) undue influence, and (3) elder abuse. He sought an accounting of the trust's assets and a copy of the trust documents. In a supplemental petition filed in August 2016, son asked the probate court to remove daughter as trustee and confirm him as the sole trustee.

Daughter never filed any objections to son's petitions.

2017 based on statements that she was still in the house at the end of June 2017, and that an unlawful detainer action had yet to be filed. Daughter does not challenge that finding on appeal.

³ All further statutory references are to the Probate Code unless otherwise indicated.

After several continuances, the court in October 2016 ordered daughter to produce an accounting of the trust's assets from June 2009 onward (that is, during the time she has served as trustee). The court set a deadline of December 30, 2016, and a hearing for February 7, 2017.

When daughter did not produce the court-ordered accounting by the February 2017 hearing, the court suspended daughter as trustee and appointed son as sole interim trustee so that son could prepare an accounting for the period of daughter's trusteeship. The court nevertheless gave daughter a further opportunity to file an accounting.

In March 2017, son filed a petition to surcharge daughter \$1,649,808 based on alleged "breach of trust, self-dealing, and misappropriation of trust assets" in (1) using the trust's liquid assets for her personal use, (2) allowing the trust to suffer an adverse judgment and (3) living in the family home rent-free for nearly five years.

In June 2017, the probate court held a hearing on son's petition for surcharge. Daughter testified, and blamed some of the depleted liquid assets on "bank error." At the end of the hearing, the court commented on the "thousands of dollars that have not been properly accounted for or explained," but took the matter under submission.

In August 2017, the probate court issued a written order granting son's petition for surcharge in the amount of \$981,178. Part of the surcharge was \$120,000 "for unpaid rent while [daughter] liv[ed]" in the family home "between July 2012 and July 2017, calculated at \$2000/month . . ." In September 2017, the court ruled on the remaining claims in son's petition by removing daughter as trustee and appointing son.

Daughter filed a timely notice of appeal.

DISCUSSION

In this appeal, daughter raises two discrete attacks on the probate court's ruling: (1) the court overcharged her \$76,000 in unpaid rent because she had Robert's permission to live in the family home while he was still alive; and (2) the court erred in suspending her as trustee in February 2017.

I. Surcharge for Unpaid Rent

A trustee of a revocable trust owes a fiduciary duty to the trust's settlor (while the settlor still lives) and to the trust's beneficiaries (once the settlor dies). (§§ 16002, subd. (a), 16004, subd. (a); *Estate of Giralдин* (2012) 55 Cal.4th 1058, 1062 (*Giralдин*).) That duty encompasses a duty of loyalty as well as a duty not to use trust property for her own benefit. (*Ibid.*; *Uzyel v. Kadisha* (2010) 188 Cal.App.4th 866, 888.) If a trustee breaches her fiduciary duty, a probate court may surcharge the trustee for any misuse of trust assets and award that money to the trust's beneficiaries. (§ 16420, subd. (a)(3) [beneficiary may petition "[t]o compel the trustee to redress a breach of trust by payment of money or otherwise"]; *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 213; *Giralдин*, at p. 1062 [beneficiaries may sue for breaches of duty to the settlor if those breaches "substantially harm[ed] the beneficiaries by reducing the trust's value"].) We review a probate court's ruling surcharging a trustee for an abuse of discretion (*Estate of Moore* (2015) 240 Cal.App.4th 1101, 1105), and review any subsidiary factual findings for substantial evidence (see *Tire Distributors, Inc. v. Cobrae* (2005) 132 Cal.App.4th 538, 544).

The probate court did not abuse its discretion in surcharging daughter the \$120,000 for her rent-free use of the

family home. Daughter does not contest the court's finding that she breached her duty of loyalty, that the family home is an asset of the trust, or that she used that asset for her personal benefit without compensating the trust. On its face, this constitutes substantial evidence supporting the surcharge.

Daughter raises what boil down to two arguments in response.

First, and chiefly, she contends that the surcharge should be reduced by \$76,000. She asserts that (1) the trust explicitly empowers a trustee to "permit any beneficiary to reside upon or occupy any real property in the Trust Estate . . . upon such terms . . . as the [t]rustee determines," and (2) Robert, as trustee, granted her permission, as a beneficiary, to live in the family home rent-free. Because she occupied the family home from June 2012 through September 2015 with Robert's permission, daughter reasons, she had his permission to live there rent-free for 38 months, which at \$2,000 per month comes to \$76,000.

We reject daughter's contention because substantial evidence supports the probate court's implicit finding that Robert never granted her permission to live in the family home rent-free. By 2009, Robert was suffering from dementia that was, at times, so severe that he mistakenly believed daughter was his girlfriend. This constitutes substantial evidence that Robert lacked the capacity to authorize daughter to live in the family home rent-free. (§ 812 [capacity requires "the ability to . . . understand and appreciate . . . [t]he probable consequences for the decisionmaker and, where appropriate, the persons affected by the decision"]; *Anderson v. Hunt* (2011) 196 Cal.App.4th 722, 727.) Daughter points to no evidence that Robert authorized her to live in the family home *before* the onset of his dementia. On

this record, substantial evidence supports the conclusion that Robert did not authorize her rent-free use of the family home between 2012 and 2015. (Accord, *Giraldin*, *supra*, 55 Cal.4th at p. 1073 [“As a practical matter . . . in the event of a surcharge action, the trustee does run a risk in relying on unwritten evidence to support a defense based on settlor direction or authorization.”].)

To the extent daughter suggests that she was entitled to occupy the family home rent-free because *she gave herself* permission to do so while acting as trustee, we reject that suggestion.⁴ Such authorization would constitute self-dealing and thus a breach of fiduciary duty. “[A]bsent clear language to the contrary,” courts must “decline to read [a trust provision] so as to permit the perverse result of depriving the court of its equitable power to surcharge the interest of a dishonest trustee-beneficiary to compensate other beneficiaries for breaches of the trust.” (*Chatard v. Oveross* (2009) 179 Cal.App.4th 1098, 1107.) The trust in this case contains no such clear language authorizing self-dealing.

Second, daughter asserts that the probate court was wrong to impose a surcharge for failure to pay rent while she was living in the family home because the home was in substandard condition and she was living there to oversee various repairs. However, the court already accounted for the poor condition of the house and daughter’s unsuccessful efforts to rehabilitate it, charging her only \$2,000 per month for unpaid rent even after

⁴ It is unclear whether daughter is making this argument because, if accepted, the entirety of the \$120,000 surcharge would be unwarranted, but daughter only seeks a \$76,000 reduction.

the parties stipulated that the fair rental value for the family home was \$3,500 to \$3,750 per month. Daughter cites no authority for the proposition that the probate court's reduction was insufficient and that she was entitled to occupy the home *rent-free* while repairing it.

II. Suspension of Trusteeship

A probate court may suspend a trustee pending a hearing on a petition for that trustee's removal. (§ 15642, subd. (e) ["The court may . . . suspend the powers of the trustee to the extent the court deems necessary."]; *Schwartz v. Labow* (2008) 164 Cal.App.4th 417, 427 (*Schwartz*).) We review a court's exercise of that power for an abuse of discretion. (*Id.* at p. 430.)

The probate court did not abuse its discretion in suspending daughter as trustee in February 2017. A trustee's *suspension* is a "less extreme remedy" than her *removal*, and may accordingly be based on any of the same grounds. (*Schwartz, supra*, 164 Cal.App.4th at pp. 427-428.) A trustee may be removed for a breach of the trust or for being "substantially unable to execute properly the duties of the office." (§ 15642, subds. (b)(1) & (b)(7).) By the time of daughter's suspension as trustee, daughter had not complied with the probate court's October 2016 order to produce an accounting of the trust's finances. This is both a breach of trust (*Estate of Cairns* (2010) 188 Cal.App.4th 937, 949) and a failure to execute the duty of her office to account for the trust's corpus.

Daughter argues that her suspension was unfair and violated due process, as her inability to conduct an accounting was not really her fault, because (1) she could not afford to hire an attorney (and her suspension precluded her from using trust funds to do so) and (2) she could not obtain documents from the

various banks and brokerage firms without assistance from the probate court. Here, the probate court did all it could to accommodate daughter's difficulty in hiring counsel, including granting several continuances for her to do so ~(RT 301-302, 601-603, 901-902)~ and referring her to State and local bar associations that might have offered lawyer referral services. ~(RT 2107)~ Ultimately, however, there is generally no due process right to counsel in civil cases (e.g., *People v. \$30,000 United States Currency* (1995) 35 Cal.App.4th 936, 942), so daughter's inability to secure counsel is not a basis to upset the probate court's suspension order. What is more, the record does not support daughter's contention that her suspension as trustee precluded her from having funds to hire counsel because the trust had been almost completely drained of liquid assets by the time son filed his petition in January 2016. Daughter's inability to provide the proper legal process to obtain bank and brokerage firm records also provides no basis to vacate the suspension order because daughter did not raise this issue with the probate court until one month *after* the accounting was due. This timing suggests that her noncompliance with the court's order to produce an accounting was not related to her inability to obtain process acceptable to the banks and brokerage firms.

DISPOSITION

The orders are affirmed.

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_____, J.

HOFFSTADT

We concur:

_____, P.J.

LUI

_____, J.

ASHMANN-GERST